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POSITING FOR BALANCING: INVESTMENT TREATY RIGHTS AND THE RIGHTS OF CITIZENS

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ABSTRACT

Substantive bilateral investment treaty (BIT) rules have the potential to undermine the rights to health, safety and the environment of the citizens of host States if stricter State regulations to protect these rights amount to regulatory expropriation or breach other investment protection rights. This article argues that the rules created by BITs are comparable with and stand parallel to the rules created by the domestic laws of host States and BIT arbitral tribunals should balance these rights when they conflict with each other. BIT arbitral tribunals act as de facto courts since they enforce rights that are assertable against the public at large and not against the host State alone. Similar to the “rules” created by BITs, an analysis of the legal nature of “rights” created by BITs also reveals that they are comparable with the rights created by domestic laws of host States. The article articulates three legal arguments founded on substantive BIT clauses, human rights, and property rights on the basis of which, three specific rights, i.e., the rights to health, safety and the environment of citizens of host States may stand parallel to the rights created by BITs in favour of foreign investors. These arguments, both individually and pooled together,

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call for balancing these citizens' rights with the rights of foreign investors arising from a BIT in the event of conflict.

KEYWORDS: *BITs, right to health, right to safety, right to the environment, international law*

I. INTRODUCTION

The current structure of the international investment regime and bilateral investment treaty (BIT) based investor-State arbitration (ITA) has been widely criticised for being harmful to the public welfare.¹ The criticism is based on the reason that the current regime hampers the ability of governments to act for their people in response to the requirements of human development and environmental sustainability. This article seeks to add another dimension to the literature by analysing BIT arbitration,² and the rights created by BITs in light of the distinctions between public and private law.³ It argues that the rules created by BITs are comparable with and stand parallel to the rules created by the domestic laws of host States and that arbitral tribunals should balance these respective rights in the event of conflict.

The rights of foreign investors are created by the rules incorporated in BITs. The first part of this article seeks to analyse the legal basis by which domestic law rules created for citizens of the host State may stand parallel to the rules created by BITs for foreign investors. The hypothesis is that as a consequence of such parallelism,⁴ BIT arbitrators are required to balance BIT rules with any conflicting rules of domestic laws of the host State, since the tribunal acts *de facto* as a court.⁵ For the purposes of its distinct approach, the article employs the term “treaty” in its two possible ways,

¹ For example, see Gus Van Harten et al., *Public Statement on the International Investment Regime*, Aug. 31, 2010, http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf (last visited May 21, 2011).

² This article primarily deals with BIT arbitration, which it also occasionally refers to as investment treaty arbitration or ITA. ITA can, however, be understood in a broader context of investor-State arbitration under investment chapter in some free trade agreements, such as NAFTA, or sectoral treaties, such as the Energy Charter Treaty.

³ See generally GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 46 (2007).

⁴ As compared to the norm-theoretic approach in this article, for a somewhat policy oriented analysis on the same issue, see Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429, 429-31 (2004); and see generally Todd Weiler, *A First Look at the Interim Merits Award in S.D. Myers, Inc. v. Canada: It is Possible to Balance Legitimate Environmental Concerns with Investment Protection*, 24 HASTINGS INT'L & COMP. L. REV. 173 (2001).

⁵ “Balancing” is a judicial doctrinal process/test that requires courts to assess whether a statute, law or other law making or administrative State action ought to be upheld (in light of the governmental interest that it serves) despite its impact on a constitutional right. See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 83-84 (2001). In domestic law, balancing commonly refers to the entire process of judicial determination of whether or not a constitutional right exist and has been justifiably limited by any State action. I am using the term for varying aspects of State action, including the conclusion of BITs creating rights and making laws for foreign investors potentially conflicting with constitutional rights of their citizens, which require balancing by BIT arbitral tribunals. On balancing, see generally Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008).

namely, as act of consent or an agreement (*ad negotium*) and as a document or an instrument of proof (*ad instrumentum*).⁶

In this context, the article addresses the question: what is the exact nature of legal rules created by BITs both in domestic and international law? In addition to BIT rules, due to their physical presence within the host State's sovereign limits, foreign investors are also subject, with respect to their property and other rights, to the domestic laws made for citizens of the host State.⁷ Special features of the substantive rules created by BITs for investors, however, complicate the relationship between domestic and international law. In domestic law, BIT rules should be viewed as either *private* (commercial) or *public* (sovereign) law rules in order to assess their standing as compared to domestic public law rules.⁸

On the international level, the presence of a treaty, such as a BIT, calls for the application of public international law to determine the rights of foreign investors under that treaty. Foreign investors, though they are not party to the underlying treaty, acquire procedural rights to investor-State arbitration from these BITs in addition to other substantive rights.⁹ Since the *locus standi* of foreign investors for arbitration is conferred by a treaty which is an international law instrument, and arbitral tribunals are supra-national forums,¹⁰ the distinction whether investor-State arbitration in international law should be categorised as *public international law* or *private international law* also becomes important for the determination of the exact nature of law created by BITs on a supra-national level.¹¹ Where all these indicators reveal the hybrid nature of rules created by BITs, this article advocates that these rules are not only comparable with domestic

⁶ Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 333 (1994).

⁷ See OPPENHEIM'S INTERNATIONAL LAW: VOLUME 1 PEACE 5 (Robert Jennings & Arthur Watts eds., 9th ed. 2008) ("[A]lthough all States are under certain obligations as regards the treatment of aliens, those obligations (generally speaking) can only be invoked by the State whose nationality the alien possesses") See also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 526 (5th ed. 2002) ("It is also said that the status of the alien is not the subject of a privilege as 'alien,' but is simply that of an 'individual' within the territorial sovereignty and jurisdiction of the host State.")

⁸ Cf. HARTEN, *supra* note 3.

⁹ The difference between substantive and procedural rights is maintained in this article where substantive rights provide "substance" and define the "real" rights of disputing parties that give rise to their legal relationship determined in the light of facts and norms. Whereas procedural rights provide the "process," whether it be domestic courts or supra-national arbitration, determining how a dispute concerning substantive rights will occur. Cf. *id.*

¹⁰ See Richard W. Nelson, *Avoidance and Settlement of International Investment Disputes*, 78 AMER. SOC. INT'L L. PROC. 38, 49 (1984). (Remarks by Gerhard Wegen)

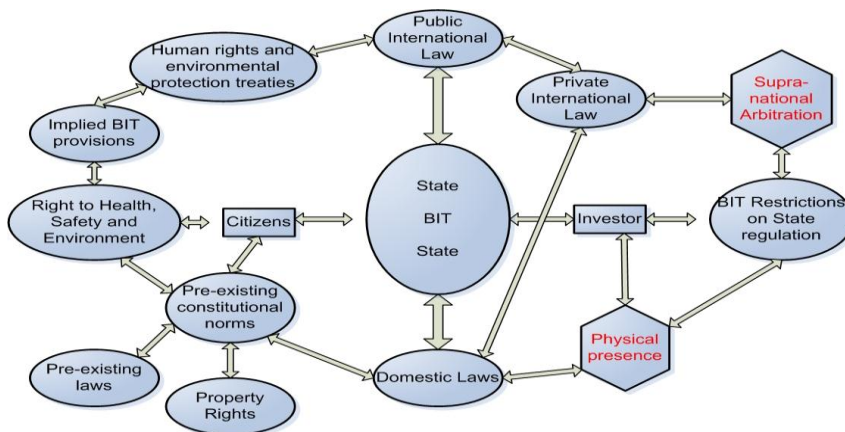
¹¹ For distinction between international law/municipal law and public international law/private international law, see MALCOLM N. SHAW, INTERNATIONAL LAW 1-2 (5th ed. 2003); For more details on the hybrid nature of international investment law, see Weiler, *supra* note 4, at 429-31; See Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, in 74(1) BRITISH YEARBOOK OF INTERNATIONAL LAW 151 (2004).

law rules but also stand parallel to them and require balancing in the event of conflict. In other words, the hybrid having abundant characteristics of domestic law is closer to domestic rules rather than the dominating rules of international law.

Further to the determination of two kinds of domestic and international public or private *law* analysis of BITs, the doctrinal analysis of BITs may also be based on the nature of *rights* created by BITs, *i.e.*, whether the right of arbitration created by a BIT is a *private* (contractual) right or *public* (legislated or constitutional) right.¹² In addition to the right to arbitrate, BITs provide other significant substantive rights to investors, *e.g.*, the right to different standards of treatment and compensation for expropriation. These substantive rights, when they are enforced by foreign investors, have the potential to impede the application of rights belonging to the citizens of the host State, *e.g.*, the right to health, safety and the environment guaranteed by domestic constitutions and other laws, and international conventions and treaties.

As currently conceived in mainstream commentary, however, both investors' rights and the citizens' rights call for mutually exclusive conceptualizations. Nonetheless, both these rights tend to negate each other in case of conflict when stricter State regulation to protect citizens' rights may amount to conflicts with investment protection standards. The common element in both categories of rights is that the host State stands between the foreign investors and its own citizens. In the second part, the article exploits three legal bases, *viz.* (1) BITs provisions, (2) human rights and (3) property rights, by which the rights of the citizens of the host State can be viewed as standing on an equal or even superior standing as compared to foreign investors' rights. This equality, it is argued, not only dictates but also eases the balancing of competing rights of foreign investors and citizens of the host State in BIT arbitrations. The forgoing discussion can be figuratively explained as follows:

¹² Here the concept of right is used to cover both the legal right and the right of action. See ROSCOE POUND, JURISPRUDENCE 84-87 (1959). See also *infra* note 38 and accompanying text.



The figure can be understood with the help of horizontal and vertical values. The State-State BIT relationship stands in the middle where the upper half of the figure shows the international law domain and the lower half the domestic law domain. The right half of the picture is the foreign investors' column and the left half the citizens' column. The two hexagons are, both located in the investors' column, where one is in the international law domain and the other in the domestic law domain, revealing the potential applicability of both domestic and international laws.

Two separate analysis are, therefore, required for both entwined but distinct questions arising out of the legal relations created by a State by concluding a BIT. First, what *type of law* has been created by a State in concluding a BIT? Second, what *types of rights* have been granted by such law? The approach in this article is both assertive and norm-theoretic and reveals the need for balancing between investors' and citizens' rights. The modest effort may, therefore, be viewed as futuristic theorising putting questions in different legal contexts. The arguments put forward here do not depict how most commentators view the present investment treaty arbitration system or the relationship between the rights of foreign investors and the rights of citizens of host States. Rather, the arguments are a descriptive and normative claim suggesting the way it would or should be viewed in the future.

II. TYPE OF LAW CREATED BY BITs

For the purposes of determining the type of law created by BITs, we need to investigate in what capacity a State was acting while concluding a BIT with respect to all possible addressees of the act in both domestic and international spheres of the State power. The addressees include all States and all persons (foreign investors as well as citizens of the host State) that

are benefited or affected by the act. Such State capacity can be determined by examining the nature of act performed by a State while concluding a BIT. In this respect BITs may be treated as sovereign acts, contracts, decrees or special laws.

A. *BITs as Sovereign Acts of States*

BITs are sovereign acts of States.¹³ These acts are subject to public international law as they are concluded between States.¹⁴ Individual BITs, however, are not “treaties of public law character”¹⁵ and do not create customary international law.¹⁶ In the public international law domain, individuals cannot bring claims against States by availing the jurisdiction of international dispute settlement forums like the International Court of Justice,¹⁷ or the dispute settlement body of the World Trade Organisation.¹⁸

¹³ See LORD MCNAIR, *THE LAW OF TREATIES* 35 (1986); SHAW, *supra* note 11, at 88.

¹⁴ See GEORGE SCHWARZENBERGER, *INTERNATIONAL LAW* 17 (3d ed. 1957).

¹⁵ Treaties of a public law character are of constitutive character and may represent the view of powerful States assuming the role of acting in public interest. For detailed analysis of public law character treaties, see Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, in 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW. 37, 70-72 (2002). Though the theory of public law treaties has not gained universal acceptance with respect to their being binding on non-party States, the public law character of a treaty should logically play a decisive role to determine priority between such a treaty and a BIT in case of their mutual conflict where BIT party States are also party to such other treaty. This suggests that if a BIT provision is inconsistent with a treaty of a public law character to which both BIT Party States are parties, the provisions of the public law character treaty should override the BIT provisions. In this context, however, human rights treaties and treaties for the preservation and protection of environment (if they are treated as treaties of public law character), should have precedence over BIT provisions in case of any mutual conflicts. Some human rights incorporated in international conventions have attained the status of *jus cogens* (peremptory norms) and the preamble of the Vienna Convention on Law of Treaties (see *infra* note 23 and accompanying text) also provides that the Party States have in mind the universal respect for human rights in general. A list of treaties on environmental protection is available at United Nations Environmental Programme, *UNEP Programmes and Secretariats in Geneva*, <http://www.unep.ch/> (last visited May 21, 2011); Chan Robles Virtual Law Library, <http://www.chanrobles.com/environmenttreaties.htm> (last visited May 21, 2011), and see also *infra* note 58 and accompanying text. The discussion on resolution of conflicts between treaties is, however, a completely different subject and thus beyond the scope of this article.

¹⁶ Cf. MCNAIR, *supra* note 13, at 259. It has been, however, recently argued by some scholars that the abundance of BITs reiterating similar provisions has translated BIT provisions into a *de facto* universal agreement making rules of public international law. See, e.g., Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303 (2009). Others have argued that the abundance of BITs does not create customary international law and that each BIT is nothing but a *lex specialis* between parties designed to create a mutual regime of investment protection. See Kishoiyian, *supra* note 6, at 329.

¹⁷ Statute of the International Court of Justice (ICJ), arts. 34.1 & 65, 59 Stat. 1031 (1945); For individual's rights before ICJ, see generally Martin Scheinin, *The ICJ and the Individual*, 9 INT'L COMMUNITY L. REV. 123 (2007).

¹⁸ See Panel Report, *United States — Section 301-310 of the Trade Act of 1974*, WT/DS152/R ¶¶ 7.96, 7.109, 7.125 & 7.136 (Dec. 22, 1999). For comments, see generally Steve Charnovitz, *The WTO and the Rights of the Individual*, INTERECONOMICS 98 (Mar./Apr. 2001), available at <http://www.worldtradelaw.net/articles/charnovitzindividual.pdf> (last visited May 21, 2011).

The only exceptions are human right treaties, but they incorporate the customary exhaustion of local remedies requirement before an individual can seek the jurisdiction of a supra-national dispute resolution forum.¹⁹

In contrast, BITs provide individual foreign investors the right to seek remedies through supra-national arbitration against violations of protections provided to them by the host State.²⁰ This characteristic embraces BITs within the arena of private international law.²¹ BITs therefore, though created by public international law, do not purport to create rules of public international law for investors coming from BIT party States. In other words, although BITs create public international law rules for the Party States, the nature of rules created for investors embrace characteristics akin to private international law. Such private international law characteristics make BITs not only comparable with domestic laws of the host State but also call for an inference of domestic laws when interpreting BITs and determining investor's rights. However, it should not be implied that all kinds of treaties that give individuals the right to supra-national adjudication fall within the arena of private international law. The claims by individuals under human rights treaties, for example, would not be private international law claims because of the public law character of such treaties.²²

B. BITs as Sovereign Contracts

BITs are also sovereign contracts governed by international law.²³ If we analyse BITs as contracts concluded by individuals,²⁴ an investor from a

¹⁹ See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, CETS No. 005, available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm> (last visited May 21, 2011). Cf. Won-Mog Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, 10 (3) J. INT'L ECON. L. 725, 730 (2007).

²⁰ Either expressly or impliedly by way of "umbrella clauses," see generally Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT'L L. 1 (2009).

²¹ The term "private international law" has been used here to denote its general role as dealing with the questions of jurisdiction of national courts of host State over the investment treaty disputes, the choice of applicable law on a dispute before ITAs and recognition and enforcement of the ITA awards by the domestic courts. See P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 7 & 453 (12th ed. 1992).

²² See *supra* note 15 and accompanying text.

²³ Vienna Convention on the Law of Treaties (VCLT), art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331. It is not unusual to analyse treaties and especially BITs as an ordinary contract in terms of domestic law, see, e.g., Anne van Aaken, *International Investment Law and Rationalist Contract Theory*, (Inst. for Int'l L. & Just., Int'l Legal Theory Colloquium Spring 2009: Virtues, Vices, Human Behavior and Democracy in International Law, Jan. 22, 2009), available at <http://iilj.org/courses/2009IILJColloquium.asp> (last visited May 21, 2011).

²⁴ MCNAIR, *supra* note 13, at 324. States are invested with the power to alienate or otherwise restrict the rights of its individuals, both personal and proprietary.

BIT Party State has no privity in the BIT contract.²⁵ In this context, the rights available to an investor under a BIT resemble that of a third party beneficiary in general contract law terms.²⁶ The rights created by a BIT vest in a foreign investor as third party beneficiary when the investor brings a dispute against the host State in the BIT designated supra-national arbitral forum. Nevertheless, the investor had the right to avail the jurisdiction of domestic courts of the host State by virtue of physical presence in the host State, and the third party rights created by BITs are not being imposed on the investor.²⁷ Where it remains discretionary for an investor to seek the benefit of the BIT designated supra-national arbitral forum or submit to the domestic courts of the host State,²⁸ the exercise of this discretion amounts to the investor's consent to the terms of the BIT.

The third party beneficiary standing on the basis of contract theory does not, by its own, put foreign investors on a superior standing in international law as compared to the legal standing of the citizens of the host State in domestic laws, except the investor's procedural right to supra-national arbitration that is not available to the citizens and may be treated as superior. On the other hand, citizens of the host State are not third party beneficiaries in domestic laws. They are subjects to whom States owe direct responsibility.²⁹ States are under a duty to protect their citizens, both in their national constitutions and under international law.³⁰ When the private nature commercial rules of foreign investment created by BITs collide with the public nature and internationally valued rules incorporated in domestic laws, balancing is required for resolution of the conflict in every course of legal determination.

C. *BITs as Sovereign Decrees*

BITs may also be analysed as sovereign decrees creating objective domestic law. BIT parties might be assumed to have created direct municipal law by way of a treaty.³¹ It might be argued that these sovereign

²⁵ See ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 44 (2009).

²⁶ See M.P. FURMSTON ET AL., CHESHIRE, FIFOOT & FURMSTON'S, *LAW OF CONTRACT* 464-74 (13th ed. 1996).

²⁷ Cf. SCHWARZENBERGER, *supra* note 14, at 461.

²⁸ The situation is comparable to the minority status given by a treaty to individuals in a foreign territory where the individuals concerned (investors in this case) have the right to determine their internationally relevant status. For a detailed discussion, see SCHWARZENBERGER, *supra* note 14, at 143.

²⁹ See Kojo Yelapaala, *Fundamentalism in Public Health and Safety in Bilateral Investment Treaties* [Part III], 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 465, 465-67 (2008).

³⁰ *Id.*

³¹ SCHWARZENBERGER, *supra* note 14, at 146. There is a degree of disagreement in the practice of States regarding the direct application of treaties in their domestic spheres without specific domestic legislation to that effect. States following "monism" assume that international law does

decrees override national constitutions and other laws because a BIT party State cannot succeed in pleading a breach of its domestic constitution or other laws as justification to violate its BIT obligations.³² Where BITs assign foreign investors a procedural right to bring disputes before supra-national arbitral tribunals,³³ they also give substantive rights (*e.g.*, compensation for expropriation and fair and equitable treatment) to foreign investors enforceable against the host States. From this perspective, BITs operate as sovereign decrees promulgating public rights *for* foreign investors where BIT party States are under a duty to enforce these rights not only *against* themselves but also *erga omnes* (against the whole world) including public entities, all individuals together with its citizens as well as other States.³⁴ Creation of these rights for foreign investors amounts to the recognition of limited international personality of foreign investors by BIT party States.³⁵

Does this actually mean that the constitutional rights of the citizens of the host State play no role in the determination of public rights of the foreign investors? I doubt that. In case of conflicts between sovereign decrees (BIT and domestic public laws), the very existence of conflict necessarily dictates balancing. It might be presumed that the BIT tribunals are not obliged to strive for such balancing, as compared to national courts of the host State. There is, however, no apparent restriction on them not to assume this obligation. BITs as sovereign decrees create domestic public law, which is comparable with other domestic public laws created by the host State. The only difference is that in addition to the jurisdiction of domestic courts, the primary subjects/addressees of BITs (foreign investors) are also entitled to benefit from supra-national arbitration for settlement of their disputes with the host State.

D. BITs as special laws

BITs are also comparable to legislative instruments promulgated for a particular class of subjects.³⁶ In this respect, BITs may be characterised as special laws that, as compared to general laws, apply to a particular class of people (foreign investors) but not to everyone (citizens of the host State)

not need to be translated into national law and the act of ratifying a treaty immediately incorporates that treaty into national law. On the other hand, some States follow “dualism” that a treaty does not automatically become part of domestic law unless explicitly incorporated by domestic legislation. See Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 628-705 (2007).

³² VCLT, *supra* note 23, art. 46(1); SHAW, *supra* note 11, at 846.

³³ See *supra* note 9 and accompanying text; SHAW, *supra* note 11, at 1-2.

³⁴ Cf. MCNAIR, *supra* note 13, at 256; Cf. SCHWARZENBERGER, *supra* note 14, at 458.

³⁵ Cf. SCHWARZENBERGER, *supra* note 14, at 459.

³⁶ VAN HARTEN, *supra* note 3, at 45.

present in the host State. Under the terms of BITs, access to supra-national arbitration is not available to the citizens of BIT party States when they are acting within their own States. This analysis raises questions for the validity of BITs being arbitrary as against fundamental rights of equality before law incorporated in most State constitutions or imported from human rights jurisprudence.³⁷ Though States might be presumed to have been restricted to justify breach of BIT obligations due to their conflict with domestic laws, the citizens of the host State are not restricted from claiming rights equal to foreign investors. This approach suggests that a citizen of the BIT Party State may petition to a competent domestic court for a ruling to avail rights equal to foreign investors including the right to initiate and/or defend a supra-national arbitration. It might be argued that this would not be a decisive move for the citizens of host States where supra-national arbitral tribunals are not bound by the rulings of domestic courts in a BIT dispute. I, however, contend that, although the arbitral tribunals are not, States are in effect bound by the rulings of domestic courts and the domestic courts can compel States to require tribunals to entertain claims of their citizens in cases where they are allowed to devise such procedures in a BIT arbitration.

Substantive BIT provisions construed as special domestic law applicable only to foreign investors may also become discriminatory against the citizens of host States. The question of discrimination arises when the subjects of this special law (foreign investors) become entitled to compensation against a State regulation causing loss or damage to their investments and the citizen, on the other hand, are not so entitled against the same State regulation. In the present system of ITA provided under BITs, however, tribunals are not mandated to consider discrimination against the citizens of the host State. Any actions to eliminate such procedural and substantive discrimination taken by the citizens of host States in domestic courts may, nonetheless, be able to influence future investment policies and result in a change in the standard provisions of BITs negotiated by their State.

III. TYPES OF RIGHTS CREATED BY A BIT

There are several distinct dimensions to analysing the rights created by BITs.³⁸ The question addressed in this article is whether rights created by

³⁷ Universal Declaration of Human Rights, G.A. Res. 217A, art. 7, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 18, 1992).

³⁸ Rights are diversely construed as legal, social, or moral freedoms or entitlements to act or refrain from acting. There is considerable disagreement about what is precisely meant by the term "rights." In domestic legal systems, there are two main constructions of rights *i.e.* "rule construction" and "principle construction." See ROBERT ALEXANDER, A THEORY OF CONSTITUTIONAL RIGHTS 47-49 (Julian Rivers trans., 2002). For the purposes of this article, we may treat the rights created and

BITs are private or public rights. The test for this determination is based on the question of against whom these rights can be asserted.³⁹ If they are assertable only against a specific person (or a State in case of BITs), they are private rights and if they are assertable against the whole world and not merely against the BIT party States, they are public rights.⁴⁰ The significance of this determination is that if the rights created by BITs in favour of investors are public rights as compared to private rights, they are comparable with the other public rights of the citizens of the host State. Furthermore, if the rights of citizens of the host State can be constructed on the parallel standing to the investors' rights under BITs, both these rights need balancing in case of conflict. In other words, the scheme is to determine the nature of both investors' and citizens' rights as public or private and then compare them with each other in order to determine whether they require balancing.

In respect of citizens' rights, the focus of this article is the rights to health, safety and the environment of citizens of States hosting foreign investment under BITs. BITs create specific rights in favour of foreign investors. BITs also tend to impliedly create rights in favour of citizens of the host States.⁴¹ These rights of citizens of the host State may also be construed on the basis of interpretive devices applicable to BIT arbitrations in international law. Finally, these rights may also equate to property rights, the protection of which is the right of individual citizens as against the public at large including foreign investors. Drawing on the wisdom of citizenship as "the right to have rights;" the pooling together of different legal bases to construct these rights can be conceptualized as both the rights as power (recognition or assertion of rights on the basis of interest) and the power to exercise rights (enforcement of rights). The effort may, however, be viewed as futuristic theorising putting questions in different legal contexts.

legislated by domestic laws (and constitutions) of the host States as "rule rights" or "*de jure* rights," the rights which exist in theory as "principle rights" or "*de facto* rights" and the rights of the foreign investor created by BITs as "special treaty rights." The "special treaty rights" may be treated as "hybrid rights" because BITs are a hybrid of public and private character on international level in respect of supra-national arbitration and also because BITs tend to create a hybrid of public and private rules on domestic level by way of substantive provisions. Cf. Douglas, *supra* note 11. Cf. *infra* note 44 and accompanying text.

³⁹ For detailed discussion on classification of rights, see, e.g., POUND, *supra* note 12, at 84-90.

⁴⁰ *Id.*

⁴¹ See, e.g., Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment, Japan-Korea, art. 16(1)(c), Mar. 22, 2002, available at http://www.bilaterals.org/IMG/pdf/korea_japan.pdf (last visited May 21, 2011). It provides that contracting parties may "take any measure necessary to protect human, animal or plant life or health." See also Agreement between Japan and the Government of the Republic of Peru for the Promotion, Protection and Liberalisation of Investment, Japan-Peru, arts. 19 & 26, Nov. 14, 2010. See *infra* notes 53 & 55 and accompanying text.

A. *Rights Belonging to Foreign Investors*

I have discussed earlier that by concluding a BIT with a provision for investor-State arbitration, party States not only recognize a limited international personality of investors,⁴² but also create substantive rights for foreign investors.⁴³ In this section, I shall endeavour to describe the nature of rights created by BITs in favour of foreign investors in respect of those against whom they may be asserted.⁴⁴ The question is whether the investors' rights are assertable against the whole world – the public at large including States which are international persons – (*in rem* rights) or against some particular international person alone *i.e.* BIT party States (*in personam* rights). *In rem* rights are proprietary in nature,⁴⁵ arising from relation to property (*res*) and not based on a personal relationship (agreement) as is the case with *in personam* rights.⁴⁶ In other words, *in personam* rights are private rights and *in rem* rights are public rights.

The plain answer to the question is that BITs create both rights *in personam* and *in rem* for the investors. First, as BITs are sovereign contracts and investors from party States are third party beneficiaries, the investors' rights are *in personam*, assertable against the host State and none else. The right to international arbitration is the only exact fit in this category as compared to other substantive rights granted by BITs because they are assertable against the whole world, including States and their citizens. Most BITs provide the standards of “full protection and security.”⁴⁷ The standard requires the host States to protect the foreign investors' investments from all acts causing loss or damage to investment. A host State can be held liable under this standard for acts that have not been directed or carried out by the host State itself or its functionaries.⁴⁸ In this sense, the foreign investor's rights are assertable against the whole world even though the liability is only of the host State to make good any losses suffered due to its failure to provide full protection and security to the foreign investor's investments.

Secondly, BITs as sovereign decrees of States give foreign investors rights *in rem* in relation to property (investments) that are assertable against

⁴² See *supra* note 35 and accompanying text.

⁴³ See *supra* note 34 and accompanying text.

⁴⁴ For detailed discussion on classification of rights, see POUND, *supra* note 12, at 84-90. Cf. *supra* notes 12 & 38 and accompanying text.

⁴⁵ The concept of property in international law includes both tangible and intangible property. Kishoiyian, *supra* note 6, at 342-43.

⁴⁶ POUND, *supra* note 12, at 85.

⁴⁷ See, e.g., Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. II(2)(a), Nov. 14, 1991; See also France-H.K. BIT, art. 2(2).

⁴⁸ See, e.g., Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Award, ¶ 67, (June 27, 1990).

the whole world. In other words, BITs create both public and private rights in favour of foreign investors. The public rights of foreign investors in respect of property are comparable with rights of citizens of host State arising from domestic public laws. The only private right of investors is the right to supra-national arbitration, which is merely a procedural right as compared to substantive property rights created by BITs. ITA awards are therefore *judgments* that determine the rights in respect to the foreign investors' property against the entire world (including the citizens of host State and State owned entities and administrative bodies), and not just against the parties to the dispute, although only host States can be held liable for violation of these rights.⁴⁹ In other words, the ITA tribunals indeed act as *de facto* courts.

B. Rights Belonging to Citizens of Host State

A host State's regulation to protect public interest causing harm to foreign investors' property raises important public policy issues. This concern compelled some authors to argue that ITA tribunals are "businessman's courts."⁵⁰ A crucial role for ITA tribunals, while dealing with the host States' sovereign powers to regulate resulting in loss or damage to the investments of foreign investors, is to balance between the rights of foreign investors and the rights of citizens of the host State. Host States are bound by the so-called "chilling effect" of BITs not to implement any regulations harmful for the investments of the foreign investors.⁵¹ In the sense of BITs as sovereign decrees, host States might also be deemed to have legislated foreign investors' rights in their domestic laws where they may conflict with the laws created to protect public rights (interests) of their citizens.⁵² Balancing is required between two public rights, *i.e.*, rights of foreign investors and those of the citizens of host States.

By concluding a BIT, the host State binds both itself and its citizens to the terms of that BIT.⁵³ In any case, the host States' liabilities against foreign investors do not impede the rights of the citizens of the host State when their rights have either equal (in domestic laws) or superior (in international law or multilateral treaties) standing or binding force as compared to the investors' rights. In the following section, I shall

⁴⁹ As if they are pronounced by courts and not mere awards rendered by arbitral tribunals in literal sense in which they are understood in commercial arbitration.

⁵⁰ VAN HARTEN, *supra* note 3, at 152-84.

⁵¹ See generally SURYA SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLES 161-71 (2008).

⁵² SCHWARZENBERGER, *supra* note 14, at 146.

⁵³ MCNAIR, *supra* note 13. Although BITs do not create direct obligations for citizens of a host state, the citizens would be indirectly affected (as tax payers) if a host State has to pay compensation to an investor for violation of a BIT.

endeavour to locate and outline the rights of the citizens to health, safety and the environment in the context of BITs and ITAs. The effort, as I said earlier, may be viewed as futuristic theorising putting questions in different legal contexts. This theorising for the assertion of rights belonging to citizens of host States has three possible rationales:

1. Rights granted to citizens by specific BIT provisions (BIT provisions rationale)
2. Citizens' rights as human rights (Human rights rationale)
3. Citizens' rights as property rights (Property rights rationale)

1. *BIT Provisions Rationale.* — The latest generation of BITs include clauses to safeguard certain standards of protection of health, safety and the environment by the host States.⁵⁴ Though the strength of these BIT clauses is debatable and appears to only be subject to the regulatory regime in these areas prevalent at the time of entry of foreign investment,⁵⁵ they give an impression of recognition of rights to health, safety and the environment of the people of host State in contrast to the foreign investors' rights under that BIT.⁵⁶ The extent of protection of these rights is, however, limited to the position where they stood at the time of entry of the foreign investment. It means that when at the time of entry of the foreign investment, the host State had enacted domestic legislation for protection of health, safety and the environment, the foreign investors are bound to the extent of that legislation.

It can be concluded that the host State has impliedly restricted itself to implement any higher standards to protect the right to health, safety and the environment than the one existing at the time of entry of the foreign investment. If the host State would implement higher standards than the one existing at the time of entry of investment, it may amount to regulatory expropriation or breach of BIT standards of treatment for foreign investment. This brings competition between the rights of citizens in existing laws of the host State and the rights of the individuals in the field of health, safety and the environment recognised by international standards or laws of the civilised countries. In other words, the relevant BIT clauses

⁵⁴ See, e.g., Article 11 of the 2004 Canadian Model BIT; Article 12 of the 2004 U.S. Model BIT; Article 11 of the 2007 Norwegian Model BIT and Article 20 and 21 of the 2005 IISD Model International Agreement on Investment for Sustainable Development.

⁵⁵ See *supra* note 41 and accompanying text. Some latest BIT proposals (e.g. Article 10 Canadian Model BIT (2004) and Article 24 Norwegian Model BIT (2007)) and the latest BITs concluded by Japan (see, e.g., Article 15(1)(c) Japan-Vietnam BIT and reservations of Japan to the Japan-Peru BIT) contain provisions designed to safeguard a State's right to regulate even after the investment is made.

⁵⁶ 2007 Norwegian Model BIT, art. 11 reads "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures or core labour standards. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor."

tend to recognise only legislated or *de jure* and not any unlegislated or *de facto* rights of the individuals for health, safety and the environment.⁵⁷ What would be the position of these unlegislated *de facto* rights when they find legitimacy from the fundamental rights guaranteed by the national constitution of the host State pre-existing the time of entry of foreign investment? The question becomes more interesting when these *de facto* rights have legitimate standing in general international law in the shape of international conventions and treaties.⁵⁸

As a matter of domestic law, the *de facto* rights are more often than not transformed into *de jure* rights by the domestic courts on the basis of constitutional theories of fundamental and human rights.⁵⁹ However, at least to the extent of *de jure* rights of the citizens expressly available in domestic laws and constitutions of the host State at the time of entry of foreign investment, BIT tribunals cannot escape balancing them with the rights of foreign investors under BITs.

2. *Human Rights Rationale.* — The primary responsibility of an ITA tribunal is the interpretation of the treaty (*e.g.*, BIT) that provides both the procedural and substantive basis for the dispute.⁶⁰ Under the rules of treaty interpretation as provided by Article 31.3 (c) of the *Vienna Convention on the Law of Treaties*,⁶¹ arbitrators may interpret treaty obligations in the light of “relevant rules of international law applicable in the relations between the parties.” Questions, however, arise as to what rules of international law are relevant in a given context of BIT arbitration at ITA. From a human rights perspective, which human rights are relevant or perhaps even overriding in the process of treaty interpretation, *i.e.*, human rights that are based on public moral imperative and shared norms of actual human moralities, as justified moral norms supported by strong reasons, as legal right at a national level or as legal rights within international law?⁶² Some human rights have become legal rights in international law with the

⁵⁷ For some reflections on rights, see *supra* notes 38 & 39 and accompanying text.

⁵⁸ Cf. Fitzmaurice, *supra* note 15. A number of international treaties and the Universal Declaration of Human Rights recognise *inter alia* rights of individuals to health, safety and the environment. For text and commentary of the eight major human rights treaties and conventions, see Office of the High Commissioner for Human Rights, International Human Rights Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited May 21, 2011).

⁵⁹ See, *e.g.*, Robert Alexy, *The Construction of Constitutional Rights* <http://www.clb.ac.il/workshops/2009/articles/alexey.pdf> (last visited May 21, 2011).

⁶⁰ See generally Campbell McLachlan, *Investment Treaties and General International Law*, 57(2) INT'L & COMP. L.Q. 361 (2008).

⁶¹ VCLT, *supra* note 23. To date the Vienna Convention has 45 signatories and 108 parties.

⁶² Human rights can be considered to be independent in their existence and justification as moral standards whether or not they are recognized by a particular national or international legal system or government. See JAMES NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 251 (1987). Cf. *supra* note 38 and accompanying text.

status of *jus cogens* (norms against slavery or racial discrimination); others are contained in the U.N. Charter,⁶³ and the universal human rights treaties and conventions.⁶⁴

In any case, a wide horizon is open for ITA tribunals to consider human rights in the course of interpreting the obligations contained in investment treaties to justify State regulations for public interest and sustainability objectives and to impede violations of public rights to health, safety and the environment by a foreign investor. A glance at the body of disputes that have been submitted to ITA reveals that human rights law has in effect already been raised in a number of instances.⁶⁵ There is an emerging trend whereby human rights obligations owed by the host State to non-parties to the ITA proceedings (individual citizens or groups within the States' jurisdiction) are coming into the picture.⁶⁶ Recently, governments, and sometimes non-governmental organizations joining ITA as *amicus curiae*, have referred to these human rights obligations in an effort to justify or defend certain government actions or measures that may have had breached the investment treaty obligations. Nonetheless, the interaction between human rights and investors' rights in ITA is highly fertile, although complex, and requires balancing.

3. *Property Rights Rationale.* — James Madison contended in his essay on property, “as a man is said to have a right to his property, he may be equally said to have a property in his rights.”⁶⁷ The actual and true determinant of property should, therefore, be the rights of an individual with regard to any property (tangible or intangible) and not the relationship between individual and property (defined in classical terms of possession and ownership).⁶⁸ Historically, property rights belonged to property in shape of things from which possessors (owners) could choose to exclude others with the expectation that those others would respect that choice.⁶⁹ In case of several co-owners, any co-owner could exclude any non-owner, but

⁶³ Universal Declaration of Human Rights, *supra* note 37.

⁶⁴ Cf. *supra* notes 15 & 58 and accompanying text.

⁶⁵ See, e.g., HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009); See also James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. OF COMP. & INT'L L. 77 (2007); see generally LUKE ERIC PETERSON, HUMAN RIGHT AND BILATERAL INVESTMENT TREATIES: MAPPING THE ROLE OF HUMAN RIGHTS LAW WITHIN INVESTOR-STATE ARBITRATION (2009), available at http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf (last visited May 21, 2011).

⁶⁶ See generally INVESTMENT ARBITRATION REPORTER, VOL. 2(8), May 11, 2009, <http://www.iareporter.com/downloads/20100107> (last visited May 21, 2011).

⁶⁷ James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865).

⁶⁸ For detailed analysis of ownership and possession in respect of property rights, see ROSCOE POUND, JURISPRUDENCE 79-117 (1959).

⁶⁹ *Id.*

not other co-owners. Still, a co-owned property would be private property because of the right of the co-owners to exclude non-owners.⁷⁰

From this perspective, the right to the environment may also be treated as a property right. The hypothesis that the right to environment is a property right brings the historical notion of property with a right to exclude others in contrast with an open-access commons, where all may use the resource (property) and none may exclude others.⁷¹ Though nobody has a right to exclude, everybody has a right to use and protect the environment.⁷² The contemporary legal and social significance of “environment property” is, therefore, not *property* in shape of things capable of being possessed with exclusion of others rather the *rights* owned by individuals to use and protect from damage. An important distinction therefore exists between *property ownership* and *property rights*. On the same footing, rights to good health and safety can also be rendered as property rights. The simple reason is that they are rights, and every right represents a property in its subject matter.

The question, however, is whether these property rights (health, safety and the environment) are public or private property rights.⁷³ In case of these being public property rights with unlimited access, the State is responsible to protect these rights by public (constitutional or administrative) law. States can, therefore, be considered constitutional custodians of these rights and under a liability to protect them in the event of any harm or damage. The same responsibility is owed to States even if these rights are considered as private property rights. The interesting element in these rights with respect to foreign investors is that these are not limited to a particular individual, class of individuals, society or even one territory (especially in case of the environment) and belong to every individual irrespective of nationality or status. The question follows, whether the foreign investors co-own these rights with the citizens of host State. If yes, they would still be liable if they damage the co-owned property.

The rights to health and safety may not be treated as tradable rights (as a right to a commercial property that can be sold or purchased) as compared to the right to a clean environment that can be considered as a

⁷⁰ *Id.*

⁷¹ For some comparisons and distinction between limited access and open access community properties, see James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95(1) CORNELL L. REV. 139, 144 (2009).

⁷² Principle 1, Declaration of the United Nations Conference on the Human Environment [hereinafter Stockholm Declaration], U.N. Doc. 11 I.L.M. 1416 (June 16, 1972).

⁷³ The distinction between private and public rights is again on the basis of the test as to against whom these are assertable. See *supra* notes 44-46 and accompanying text; see also *supra* Part III.A.

tradable right.⁷⁴ If the environment is treated as a tradable right, it might be argued that the host State has traded-off the right to environment of its citizens when it concluded a BIT allowing foreign investment in its territory on terms that it will not impose stricter regulations to protect the environment than those existing at the time of entry of the foreign investment. This brings us again to the question whether States have the capacity to conclude treaties that negate their obligations arising from domestic laws or other international treaties.⁷⁵ Considering environment as a tradable right, however, the foreign investors would either be treated as co-owners of environment property with citizens or implied licensees of the host State to use the environment property. As stated earlier, foreign investors cannot escape liability if they damage a co-owned property. However, if the foreign investors are licensees, the terms of implied license may be deemed to include implicit acceptance of associated environmental damage. In this case, the question is whether or not the terms of this license are unilaterally alterable by the host State in varying circumstances?

In any case, the right to environment property can be construed as a public right which is not only shared by both citizens of the host States and the foreign investors but also protected by domestic laws and universally acceptable international norms.⁷⁶ When the right to environment clashes with the other rights granted by BITs to foreign investors, balancing is inevitable.

IV. CONCLUSIONS

Although created and governed by the rules of public international law, BITs are not treaties of public law character and create rules of private international law. The exceptional right of foreign investors to supra-national arbitration bypassing domestic laws brings BITs even closer to the notion of private international law. Such private international law characteristics make BITs not only comparable with domestic laws of the host State but also call for an application of domestic laws when interpreting BITs. Where foreign investors naturally prefer investor friendly supra-national arbitration over the domestic courts of the host State to resolve their disputes with the host States, these supra-national tribunals can, however, view themselves as an extension of the domestic courts

⁷⁴ See generally COMMONWEALTH GOVERNMENT OF AUSTRALIA, ECOLOGICALLY SUSTAINABLE DEVELOPMENT: A COMMONWEALTH DISCUSSION PAPER (1990).

⁷⁵ Yelapaala, *supra* note 29, at 465-67.

⁷⁶ A list of international agreements for the protection of the environment is available at Environmental Treaties and Resource Indicators, <http://sedac.ciesin.org/entri/> (last visited May 21, 2011). See also *supra* note 15 and accompanying text.

created by BITs, which are indeed sovereign decrees promulgating domestic law.

Foreign investors do not have privity of contract in BITs, and the third party beneficiary standing on the basis of contract theory does not put foreign investors on a superior standing as compared to the citizens of the host States. When the private nature of commercial rules of foreign investment created by BITs collide with the public nature and internationally valued rules incorporated in domestic laws, balancing is required in the every course of legal determination. Furthermore, the decisions of ITA tribunals determine rights that are assertable against the whole world and not merely against the defending States. Tribunals are therefore required to balance BIT rules when they conflict with the public law rules created by domestic laws. A further analysis of BIT rules as special laws reveals that these rules are potentially discriminatory against the citizens of host States since they create more favourable procedural and substantive rights for foreign investors. Any domestic court's ruling declaring BITs discriminatory against the State citizen might alter the future as well as existing BIT practices in a way that brings the application of domestic laws before ITA tribunals.

The rights based analysis of BITs highlighted that the rights of foreign investors under BITs can be divided into private and public rights. They are private to the extent of the right to supra-national arbitration which is assertable against the host State alone acting as an international person. The other substantive rights given by BITs to foreign investors are public in nature since they are assertable against the public at large including the citizens of the host State. This factor makes these rights comparable with the rights of the citizens stemming from the specific BIT provisions, domestic laws and constitutions of the host States, international law, or from other international treaties concluded by the host State, and call for balancing.

In contrast to the foreign investors' rights, the rights to health, safety and the environment of the citizens of host States have been gradually strengthened in the latest generation of concluded and proposed BITs. By requiring a stand-still of the regulatory regime prevalent at the time of entry of foreign investment, these BITs have at least the effect of maintaining the status quo for the minimum level of protections provided by the domestic laws of the host States of citizen's rights to health, safety and the environment. A gradual transition from the modest recognition and conservation of these rights to a general authorization of more abstract standards of human rights is expected in light of the increasing pressure on States to curtail the privileges granted to foreign investors that hurt public interests. The increasing trend of *amicus curie* briefs raising human rights concerns in ITAs is evidence of such a development.

Although it may appear to be over ambitious at present, the right to the environment may also be treated as a shared property right between citizens of host State and foreign investors. In this regard, foreign investors may also be treated as licensees to use environment property. None of these assertions give the foreign investor a right to damage the environment property. The argument of trading-off the environment property with foreign investment is flawed since the foreign investors also share the right to use the environment property with the citizens of the host State. The arbitrators may, therefore, be required to protect the environment property by balancing the damage caused to it by foreign investors and the efforts made by the host State for its protection.

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